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U.S. Citizenship
and Immigration
Services

B6

FILE: EAC-02-116-50662 Office: VERMONT SERVICE CENTER

Date: JUN 28 2004

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker or Professional Pursuant to Section 203(b)(3) of the
Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an engineering firm. It seeks to employ the beneficiary permanently in the United States as a secretary. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

The director denied the petition because he determined the petitioner failed to establish its eligibility to pay the proffered wage.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulations at 8 C.F.R. § 204.5(g)(2) state in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. The petition's priority date in this instance is April 16, 2001. The beneficiary's salary as stated on the labor certification is \$15.35 per hour or \$31,928 per year.

With the petition, counsel submitted copies of the petitioner's 2001 Form 1120 U.C. Corporation Income Tax Return. The tax return for 2001 reflected gross receipts of \$151,305; gross profit of \$151,305; compensation of officers of \$0; salaries and wages of \$0; and a taxable income before net operating loss deduction and special deductions of \$2,022. Schedule L of the return reflected current assets of \$547; current liabilities of \$0 and net current assets of \$547.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE), dated April 19, 2002 the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing. The RFE specified the petitioner's federal income tax return, annual reports or audited financial statements and evidence of wage payments to the beneficiary, if any.

In response to the RFE, counsel submitted a letter in which he stated that the petitioner had a profit of "\$145,399.00" which was split among the partners and that they would decrease their salaries by \$16,000 each in order to pay the proffered wage. Counsel submitted a second copy of the petitioner's 2001 Form 1120, with supplemental attachment to "other deductions page 1, line 26" showing that the petitioner had total expenses of \$148,664 during 2001, \$145,399 of which were independent contractor fees.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage because the petitioner could not use monies already expended as evidence of its ability to pay future wages, and denied the petition.

On appeal, counsel states that during 2001 the petitioner had "only \$3,884.00 operating expenses. That's less than (3)% of the gross income [that] went to expenses." Counsel further states that the "partners shared \$145,399.00 of the profits for the year 2001." Counsel states that CIS should not consider the profits as funds already expended, but rather as available funds from which the beneficiary could be paid the proffered wage.

Counsel's statements regarding the petitioner's expenses during 2001 notwithstanding, in determining the petitioner's ability to pay the proffered wage, CIS will first examine the net income figure reflected on the petitioner's federal income tax return, not gross receipts, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989) [REDACTED] *Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). [REDACTED] the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The petitioner's Form 1120 for calendar year 2001 shows a taxable income of \$2,022 and net current assets of \$571. The petitioner could not pay a proffered wage of \$31,928 out of these figures.

After a review of the federal tax returns, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.